UTILITY FUELS, INC.

AND

INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS,

LOCAL 66, AFL-CIO

A 70 300 0033 93

LAYOFF OF SAM L. THORNAL

APPEARANCES

FOR THE COMPANY

L. CHAPMAN SMITH

ROSS E. COCKBURN

FOR THE UNION

ROBERT W. RICKARD

BEFORE

OTIS H. KING, ARBITRATOR

Utility Fuels, Inc. hereinafter called "UFI" or "Company" and International Brotherhood of Electrical Workers, Local Union No. 66, AFL-CIO, hereinafter called "Union" did appear before the undersigned duly appointed and authorized Arbitrator and present the following issues:

Union's version of the issue

Whether or not the Company violated the Collective Bargaining Agreement, and specifically, Article IV, Section 7 thereof, in the manner in which it conducted the reduction in force in the Spring [sic] of 1992, and whether or not the Company violated the Collective Bargaining Agreement in laying off Sam Thornal out of line or seniority? If any violation of the Collective Bargaining [Agreement] is found, then what is the appropriate remedy?

Company's version of the issue

Did the Company unreasonably and unjustly discriminate against Grievant by terminating him while retaining less senior heavy equipment operators?

A hearing was held on June 17, 1993, at the University Hotel, Sam Houston State University, in Huntsville, Texas. Both parties appeared at the hearing and were afforded a full opportunity to be heard, examine and cross-examine witnesses, and to introduce evidence bearing upon the issue. A transcript was prepared of the proceedings and both parties have submitted written post hearing briefs.

RELEVANT CONTRACT PROVISIONS

ARTICLE III, SECTION 5

> The Company shall have the exclusive right to determine its operating policies and manage its business in the light of experience, business judgment and changing conditions *consistent with the terms and conditions of this Agreement* (emphasis added). The Company shall retain all right, power and authority not specifically relinquished in this Agreement.

ARTICLE IV, SECTION 7

> In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and

qualifications are equal, length of service at that facility shall govern. . . the Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II. . .

FINDINGS OF FACT

Utility Fuels[1] (UFI), at the time of the occurrence of the events that gave rise to this case, was owned by Houston Industries Incorporated which is also the parent company of Houston Lighting and Power (HL&P). UFI maintained employees at two HL&P power plants, one commonly known as W. A. Parish Plant, located west of Houston and the other commonly known as the Limestone Plant, located in north central Texas.

Sam Thornal, the Grievant in this case, was working at the Limestone Plant at the time of his permanent layoff on June 1, 1992, during a reduction in force (RIF). Thornal became an employee of the company in 1984 when UFI took over its predecessor. At that time, the Grievant was working at the W. A. Parish Plant. Thornal transferred to the Limestone plant in June,

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[1]The Arbitrator was informed in the Company's brief that Utility Fuels was merged into HL&P during the summer of 1993.

1985 as a heavy equipment operator (HEO). The Grievant was given the same seniority date as two other HEOs at Limestone. When Grievant was terminated effective June 1, 1992, this seniority date reflected the highest level of seniority among the HEOs at the Limestone Plant.

In the fall of 1991, a decision was made that HL&P, the Company's primary customer, would cut its costs by 40% based on expenditures for 1991. To accomplish its cost reduction goal, UFI recognized that it would, in all likelihood, have to reduce its labor force. In anticipation of the work force reductions, the Company initiated an employee evaluation process in February of 1992. At the time this process was initiated, no one at UFI knew how many positions (if any) in any particular classification were to be eliminated. The evaluation process consisted of each supervisor's filing out a Special Performance Profile (SPP) for each employee that reported directly to him. The SPPs are broken down into five areas as follows: Evaluation of performance in present job function; Evaluation of job-related personal characteristics; Evaluation of special skills; Evaluation of potential to perform another job function within functional area; and Evaluation of other job-related factors. Criteria

to be considered were provided under each area to be evaluated. A space for comments and space for a point score were also provided for each evaluation element. At the bottom of the SPP is a box for providing an "Overall Evaluation of Ability/Skill/Qualifications" of either above average ("Above Avg"), average ("Avg"), or "Marginal".

According to the Company, it did not know how many employees would be permanently laid off at the time it performed the ratings. When UFI determined how many positions needed to be eliminated in each particular classification, it took those employees rated "marginal" and, by seniority, made termination decisions. If this did not meet the needed reduction, those employees rated "average" were, by seniority, laid off. And, although it did not happen, if more reductions were needed, those employees rated, "above average" would have been laid off by seniority.

Before the RIF, there were sixty-one (61) bargaining unit employees at Limestone. Eleven (11) employees were laid off: one (1) out of the six (6) electricians; one (1) out of the five (5) electrician helpers; two (2) out of the eight (8) HEOs; two (2) out of the ten (10) mechanics; one (1) out of the six mechanics' helpers; none of the four (4) operators; two (2) operators' helpers;

and two (2) out of the five (5) warehousemen. Out of eleven employees laid off, eight (8) were laid off out of seniority order; ten (10) were rated "marginal"; and one (1) was rated "average".

The ratings were not based on a fixed scale of points but rather depended on the supervisor doing the rating and the employee's job classification. For example, the Grievant received a total of nine (9) points which was considered "marginal" in the HEOs' classification, but in the Operator Helper's classification, an employee received only five total points and was rated "average".

UFI determined that 2.19 HEOs at the Limestone Facility needed to be eliminated out of the eight that were then employed. This amounted to the termination of two HEOs at Limestone, with the remaining .19 to be accounted for by a reduction in overtime. The following is the ranking of the eight HEOs; Dillard, 17; Martinez, 15; Boudiette, 14; Payne, 14; Kent, 13; Trammel, 11; Grievant Thornal, 9; and Byers, 5. Both the Grievant and Byers were given ratings of "marginal". Trammel, Kent, Payne, and Boudiette were rated as "average", and Dillard and Martinez received "above average" ratings. As Grievant and Byers were the only HEOs rated "marginal",

and two HEOs needed to go, they were terminated. The other six HEOs retained their jobs.

THE ISSUE BEFORE THE ARBITRATOR

Union's position

The Union's position is that the proper issue before this Arbitrator involves an examination of the entire process utilized by the Company in determining which employees would be selected for layoff, and raises a question as to whether or not that process, itself, also contravenes the terms of the Collective Bargaining Agreement. The Union argues that the case is so constituted as to require the Arbitrator to find that the entire layoff violated the contract and, thus, all persons laid off out of line of seniority are entitled to reinstatement and back pay as well. Specifically, the Union argues that the structure of the grading system utilized by the Company is so vague and ambiguous as to be inherently suspect. The Union contends that the system should have established clear distinctions between levels of employees. The Union argues that by utilizing what appears to be a gradual scale with no defined levels or lines of demarcation, the Company's evaluation process was not designed or intended to separate employees upon a clear difference in "ability, skill, and qualifications", but

was instead intended to allow the supervisors to subjectively determine who they thought were the best employees. In addition, the Union claims that the process as a whole was totally arbitrary.

Company's position

It is the Company's position that the elimination of subjective judgment in the evaluation of employees is virtually impossible. The selection and use of the rating form must be viewed as a reasonable use of managerial authority and discretion. The company argues that the Agreement gives it the right to determine ability, skill and qualifications before applying seniority in a layoff. The Company contends that layoff decisions came at the end of a carefully constructed and implemented process which was designed to meet the Company's legitimate needs for a RIF.

Discussion

Res judicata and precedent

The Company attached the decision of arbitrator Milton Fox in IBEW and Houston Lighting and Power, FMCS 93/00686 (July 1, 1993) to its brief. After the submission of briefs by both parties, the decision of arbitrator Julius Rezler in IBEW and Houston Lighting and Power, FMCS 93/00674 (September 14, 1993) was

decided and furnished to the Arbitrator by counsel for the Company. Arbitrator Rezler held that the decision of Arbitrator Fox constituted res judicata because the case now before him involved "the interpretation of the identical contract provision, between the same company and union" as that considered and decided by Arbitrator Fox. Although, according to the Company's brief, Utility Fuels ceased to exist and was merged into HL&P in the summer of 1993, and although, at the time of the hearing, Utility Fuels and HL&P were siblings, both being owned by parent company, Houston Industries; at the time of the origination of the grievance, Utility Fuels was a separate legal entity. As such, it was a different party from HL&P, thus, even though the contract language is the same, and the Union before this Arbitrator is the same as that before Arbitrators Fox and Rezler, the principle of res judicata does not apply as the Company in this case, Utility Fuels, in law, was not the same at the time of this grievance as the Company before Fox and Rezler.

While the decision of Arbitrator Fox does not present a collateral estoppel to the consideration of the question of the propriety of the evaluation scheme used by the Company, this Arbitrator does agree with Arbitrator Fox as to the nature of the burden of proof of the parties

and the proper manner of interpretation of the layoff provision in this case Article IV, Section 7.

The issues before the Arbitrator

At the outset, the Arbitrator would like to point out that he views this case as presenting a single grievance; that of Sam L. Thornal. It was not a mass grievance filed on behalf of all eight (8) employees laid off out of seniority order. Thus, while the decision of the Arbitrator on the issue of whether the Company violated Article IV, Section 7 of the Collective Bargaining Agreement in the manner in which it conducted the reduction in force, to the limited extent that it has any precedential value, may effect other grievances between the parties, the Arbitrator does not herein propose to assert any authority greater than that which is necessary for the settlement of the grievance of Sam Thornal.

Did the Company violate the Contract in the manner in which it conducted the layoff?

This Arbitrator agrees with both Arbitrators Rezler and Fox that the Collective Bargaining Contract, in this case, Article IV, Section 7, allowed the Company to develop some system of evaluating its employees prior to layoff. The threshold question, hence, is not whether the company could legitimately develop a plan for determining

"ability, skill, and qualifications" but whether the procedure chosen, on its face, was clearly violative of the contract or was otherwise inappropriate in that it was arbitrary, capricious, or discriminatory. The Arbitrator believes that the procedures utilized by the company were, on their face, reasonably calculated to fairly accomplish the determination of "ability, skill and qualifications" consistent with the requirements of the Contract. Whether an employee is equivalent to another employee poses a difficult question. Nonetheless, although some subjective judgement may be unavoidable, objectivity in the process must be the decisive component.

In examining the SPPs, this Arbitrator finds that the criteria considered is within the scope of the contractually allowable factors of an employee's "ability, skill, and qualifications". The criteria the Union questions are "interface with others"; "willingness to perform beyond routine requirements of current job;" "transferability of job knowledge or experience"; "multiple skills"; "absenteeism"; and "recent change to present position". Except for "recent change to present position", all of the foregoing criteria, arguably, relate to the employee's *ability* to get the job done. Although this Arbitrator does not see the purpose of considering whether an employee had a "recent

change to present position", this single objectionable criterion under one of the five elements of evaluation is not sufficient to render the entire scheme impermissible on its face.

The Arbitrator accepts the Company's position that it had a right to construct a process for the determination of relative job abilities of its employees and that the plan as constituted was contractually acceptable, however, the Arbitrator is troubled by the manner in which the plan was actually implemented. The notion that there were to be no ties, that each classification should have an equal distribution of "above average", "average", and "marginal", and that the supervisors were to be happy with the rankings because the employees not terminated would be working at Limestone for a long time, raises some serious questions as to whether the process, while capable of fairness on its face, was, in actuality arbitrary and unjust in its application. It would have been possible for employees in the same job classification to receive equal points, thus, in theory, making the employees equal. Now if there were eight (8) employees in the same classification and they all scored nine (9) total points, the supervisors would have to break all ties. There would therefore be eight different scores. Moreover, if ratings had to be

equally distributed, then the result could be two ratings of "marginal", three ratings of "average", and three ratings of "above average". In such a scenario, it would have been possible for the most senior employees to receive "marginal" ratings, resulting in their being terminated, even though initially it was determined that all eight (8) employees were equal in "ability, skill and qualifications". Such a result as this, clearly would have violated the Contract.

However, in actual application of the procedure, this was not the case as all the ties occurred where employees received a high number of total points and were reasonably safe from termination. Two electricians tied at fourteen (14) total points. The one electrician rated "marginal" scored only six (6) points. Two HEOs tied at fourteen (14) total points. The HEO with the highest point total who was rated "marginal" scored nine (9) points. Three mechanics tied at thirteen (13) points. The mechanic's highest "marginal" score was five(5). Three Ops. helpers tied at thirteen (13) and three tied at eleven (11). Ops. helpers highest "marginal" score was three (3). The two highest warehousemen tied at sixteen (16). The highest scoring warehouseman that was terminated scored (12). Thus, whether any of these ties

are broken or not, the employees that tied were not going to be affected and the results would not have changed.

The Union also argues that the Company conducted the process unreasonably by establishing ratings of relative equality and then evenly distributing the ratings. Under Article IV, "the Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II." As will be discussed, this Arbitrator finds that the notion of relative equality is reasonable and is the type of seniority clause the parties have negotiated. Additionally, while the supervisors may have been told to distribute the ratings evenly, the fact is the ratings were not distributed evenly. The Arbitrator is of the opinion that the Union failed to substantiate its position that the Company's evaluation process, on its face, constituted a violation of the Collective Bargaining Contract or was arbitrary, unreasonable, or unjust.

A layoff that results in 73% (8 Of 11) of those affected being laid off out of seniority order certainly raises a strong inference that the ratings were applied in a biased manner. However, having decided that the evaluation system was not invalid on its face, it is not possible to decide the issue of the application of the

scheme to the other seven employees so situated as the Grievant without their being before the Arbitrator. It has been ruled that the scheme of evaluation was proper on its face. This means that it was capable of being applied in a valid manner. The only process of determining whether it was, in fact, applied improperly, on the whole, would require that the entire record of the evaluations of all 61 employees working at the facility at the time of the layoff be properly before the Arbitrator for consideration. In the absence of such a proceedings, the order and demarcation lines the Company chose, as in this case involving the Grievant Sam Thornal, will have be to examined on an individual basis to determine whether the Company conducted the evaluations arbitrarily as to that particular grievant. Thus, while it was necessary to consider the propriety of the evaluation process on its face before determining the reasonableness of its application to the Grievant, no determination of the whole process as applied is either appropriate or possible at this time.

THORNAL'S LAYOFF

The Arbitrator will now move forward to a consideration of whether the Company violated the Collective Bargaining Agreement in laying off Sam Thornal out of line of seniority?

Burden of Proof Issue

Union's position

The Union argues that "the burden of proof in this case is upon the Company, once it has established, as is undisputed, that the Grievant had greater seniority than a number of other employees who were not laid off, to show that the Grievant's relative "ability, skill and qualifications" were clearly inferior to those employees who were not laid off." Further, it is the Union's position that the Company has failed to satisfy this burden and as a result, the grievance must be sustained.

Company's position

The Company argues that as "the Agreement expressly grants it the right to determine, ability, skill, and qualifications, the Union bears the burden of proof when it challenges the Company's determination."

Discussion regarding burden of proof

In contract interpretation cases, the burden of proof and of going forward is on the party initiating the action. However, that initial burden is satisfied once a prima facie case has been established. In determining whether sufficient evidence to constitute a prima facie case has been presented, it is necessary to first consider the theory upon which the moving party's action is premised. It must

then be determined whether that which has been presented, if taken to be true, is sufficient, in the absence of rebuttal, to warrant a ruling in favor of that party. Once that threshold has been crossed, the opposing party has the burden of going forward to offset that prima facie case. In this Instance, the Union's theory is that the Company has violated the Collective Bargaining Contract by laying off a senior employee while retaining a junior employee. In a case such as this, and here this Arbitrator agrees with Milton Fox that the clause involved is a "relative ability" seniority provision, the Union has met its burden of proof when it has established that the Grievant was laid off out of line of seniority. This it has done. And once that has been done, the Company has the burden of showing that pursuant to the Contract, the "skills, ability, and qualifications" of the employee so bypassed were not equal to those of the junior employees it has chosen to retain.

Thornal's evaluation

Company's position

As set forth in its brief, "it is the Company's position that in determining Grievant's ability, skill and qualifications, and in selecting him for termination in the RIF, the Company did not unreasonably and unjustly

discriminate against Grievant and thus did not breach the contract."

Union's position

It is the Union's position that the Company has failed to establish a justification for the Grievant's "marginal" rating. The Union argues that it is essentially undisputed that Grievant was at least average, if not above average in this ability, skill and qualifications as a Heavy Equipment Operator. Additionally, the Union contends that it has been shown that the Grievant had better skills and was better able to perform his job than at least one employee below him in seniority who retained his job and this, alone, is sufficient to warrant sustaining the grievance of Sam Thornal.

DISCUSSION AS TO THORNAL'S EVALUATION

To determine whether the Company's evaluation process was, indeed, conducted in an unjust and arbitrary manner against the Grievant, it is necessary to examine the SPPs and consider the scores given to the HEOs. The comments written on the SPPs offer some suggestion of what the supervisors considered to determine the particular point scores.

Ronnie Dillard scored the highest total points among the HEOs. He received the highest points allowed

on the "Personal characteristic element", 5 points. For this factor, the supervisor wrote in the comments, ". . . [h]e has trained several operators. . ." Grievant scored only 1 point on this factor. The supervisor wrote, "he doesn't always use his best judgment on lignite pile." Grievant trained HEO Trammel and other HEOs that were not laid off. Apparently, the supervisor thought Dillard's willingness to perform beyond what he considered to be the routine requirements of the job, i.e., the training of other operators, very significant. However, this fact was not mentioned, and apparently not considered for Grievant although seemingly one of the major determinant for Dillard's receiving 5 points on this element of evaluation. On the "evaluation of other job-related factors", Dillard received +2. In the comment section, the supervisor wrote, "Good judgment, willingness to work with others, has trained several others." However, although "judgment" was listed among criteria for the personal characteristics factor, it was not included under other job-related factors. Additionally, Dillard was again cited for having "trained several others", although this was ostensibly one of the reasons why he received a perfect score of "5" on the "Personal characteristics" factor. This improper double positive consideration of criteria, in effect, allowed Dillard

to receive 7 points on the "Personal characteristics" and "Other job-related factor" while the Grievant on the other hand was penalized by an improper double negative consideration and received only 1 point on these two factors. The Grievant, in fact, received zero (0) points on the "Other job-related factors". The supervisor wrote, "Does not always use the best judgment. . ." In giving Thornal a score of "1" on "Job-related personal characteristics", he had written "[h]e does not always use his best judgment on lignite pile." The supervisor thus negatively considered Grievant's "judgment" twice with devastating effects on his evaluation of him. He considered it once where it was listed as a criteria, and a second time where it was not listed as a criteria. In fact, on the very first element, "Performance in present job", the supervisor, after commenting that Grievant's "ability to operate heavy equipment is above average," went on to note that "[h]e isn't always willing to manage lignite pile as directed by supervision." Thus, it could be argued that the "judgment" criteria was applied for a third time and limited Grievant to a "7" on the first element of evaluation.

Steve Payne and Steve Trammel both received +2 points on the "Other job-related factors". The supervisor

commented on both as to their lack of an absenteeism problem. The evidence reflects that Grievant had an excellent attendance record. In fact, the Performance Appraisal Forms for 1988 and 1990 show that a good attendance record was a goal for Grievant. Yet Grievant received zero points on the factor where consideration of one's attendance record was a stated criteria and no comment was made of his excellent record. The supervisor, thus, appeared to have arbitrarily determined to position the Grievant in such a manner as to deliberately and unreasonably deprive him of the necessary points to reach an "average" rating. It is very difficult for this Arbitrator to understand how an employee of Thornal's acknowledged ability to perform his assigned work at a level equal to or above the level of the other HEOs would receive an overall rating of "marginal" even on a comparative basis. It is obvious that Grievant's supervisor was unwilling to consider his positive features and give him credit for his strengths of good attendance and training other employees. He used the latter criteria to doubly reward Dillard. On the other hand, that supervisor was more than willing to penalize the Grievant twice and, perhaps three times, for his alleged lack of "judgment". Much of the negative testimony about this

nineteen year employee's lack of judgment, inability to get along, unwillingness to accept authority, and headstrong desire to do things his way, struck the Arbitrator as an ex post facto attempt to paint the Grievant as an unsatisfactory employee to justify the action taken rather than a straight forward effort to place him in an honest objective light.

It is the opinion of this Arbitrator that the Union met its threshold burden of establishing that the Grievant was laid off out of the line of seniority. Furthermore, the parties having negotiated an agreement setting up a "relative ability" seniority system for layoffs, the Company had the burden of showing that the Grievant deserved a rating of "marginal", permitting it to lay him off while retaining HEOs with less seniority. This it has failed to do. The Company has not carried its burden of showing that the Grievant was indeed "marginal" and that the employees with less seniority, like Trammel, were entitled to a higher rating of at least "average". The Arbitrator has already indicated that he accepts that the scheme of evaluation developed by the Company was legitimate on its face. However, as the evaluation process was applied under the concept of "relative ability", the Arbitrator does not accept that the Company's decision to terminate the

Grievant while retaining Trammel was a reasonable one. Even without finding that the Company improperly rated Thornal, and accepting that the HEO supervisor had the right to make a subjective line of demarcation between "marginal" and "average", it is still difficult to comprehend that an employee with a score of "9" is not relatively equal to one with a score of "11". The question then to be answered, particularly as there was no objective scores for the categories, is why were they both not rated as "average"? This is even harder to understand when it is noted that Byers, who received a score of "5", four points below the Grievant, was, for rating purposes, considered relatively equal to the Grievant, they both were "marginal", and yet the Grievant, was only two points below Trammel, was not considered relatively equal in ability to Trammel. As applied, without any predetermined objective scores for placing employees into rating categories, there was simply too much room for mischief. The Company in its application of the evaluation process to the Grievant was unreasonable both in its rating of him and in assigning him to the category of "marginal".

The Arbitrator routinely hears annual appraisal grievances in the federal public sector. In those cases, if

the Arbitrator finds that the grievant has not been accurately and fairly appraised in accordance with law, rule, regulation, or the parties Master Labor Agreement, he is to set aside the rating. Once having decided to set aside the rating, the Arbitrator must then decide whether he is able to determine from the record before him what the performance appraisal would have been but for management's violation. If he can make such a determination, he may order the appraisal rating that he believes is appropriate. If the Arbitrator is not able to determine from the record what the performance appraisal would have been but for management's violation, he must remand the case to management for reevaluation consistent with his opinion. In this case, the Arbitrator finds that the Company did not give the Grievant a fair appraisal. Moreover, the Arbitrator is able to determine from the record, at least what the minimum performance rating should have been. The Grievant should have received no less that (2) on "Job-related characteristics". This is based on the fact that "judgment" is only one of nine (9) listed criteria and a deficiency in this one factor should not exercise such a negative effect on this element, particularly as it was cited on "Performance in present job function" and presumably caused the Grievant at least a

point on that element. On the element of "Other job-related factors", the Grievant should have been assigned, at minimum, a +2. This is based on the fact that "judgment", which has been used negatively against the Grievant on one and, possibly two, other occasions, is not a criteria for this evaluation factor and should not have been cited. On the other hand, the Grievant should have received the same credit for low absenteeism as was assigned to Trammel. Additionally, the Grievant should have been awarded credit for having trained others as was given to Dillard. These are minimum score changes that the Arbitrator would make based on the record before him. With these corrections, the Grievant is raised 3 points to "12" which puts him into the "average" category and ahead of Trammel.

Moreover, regardless of the Arbitrator's ability to determine from the record before him the rating that is appropriate for Grievant, the Company has not carried its burden of proof that Grievant should receive a lower rating than Trammel. The evidence supports a finding that based on ability, skill and qualifications, the Grievant should, at minimum, be no lower than the category into which Trammel was placed, thus, forcing the evaluator to consider seniority. As Grievant had more seniority than

Trammel, he should have been terminated before Grievant. This is all that need be shown to warrant a finding in favor of the Grievant.

AWARD

Having found that the Company acted unreasonably and unjustly in the manner that it applied its layoff evaluation process to the Grievant, it was not justified in laying off the Grievant out of line with his seniority while retaining employees with less seniority. Accordingly, the grievance is sustained. The Grievant is to be reinstated with backpay and seniority and such other benefits as to which he would have been entitled but for being permanently laid off.

The Arbitrator retains jurisdiction for the sole and limited purpose of providing such further relief as may be necessary in the implementation of this award.

Decided this 31st day of December, 1993 in Houston, Texas.

SIGNED: s/OTIS H. KING, ARBITRATOR